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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY, WIGGINS FERRY COMPANY et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.

No. 425.

REPLY BRIEF FOR APPELLANTS.

R. V. FLETCHER,
L. J. HACKNEY,
ALEX. P. HUMPHREY,
MORISON R. WAITE,
T. W. WHITE,
D. P. WILLIAMS,
T. M. PIERCE,
J. L. HOWELL,
Solicitors for Appellants.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

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REPLY BRIEF FOR APPELLANTS.

Appellants have concluded to file a short joint reply brief in answer to the brief filed by Appellees, the West Side Lines. No effort will be made to discuss questions which have been considered in the original briefs. Much of the argument submitted by Appellees has been anticipated in the original briefs. However, there are some contentions advanced by Appellees that seem to justify a reply.

I.

Appeal Not Under Section 238 of the Judicial Code.

In the argument for Appellees, West Side Lines, there is found the curious contention that since a Justice of this Court allowed the appeal in this case with supersedeas, therefore the appeal was taken under Section 238 of the Judicial Code, and as a result the only question presented is whether the Court had jurisdiction as a Federal Court. It is obvious that the contention is without merit. Several reasons indicating the lack of merit in this contention may be suggested. In the first place, manifestly the appeal was not taken under Section 238 of the Judicial Code. The Expedition Act (Ch. 544, 32 Stat. 823), being an act to expedite the hearing and determination of equity suits arising under the Sherman Anti-Trust Act, provides:

> "That in every suit in equity pending or hereafter brought in any Circuit Court of United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

It will thus be seen that by express provision of the statute an appeal from the decree in the instant

case could have been taken to no other Court than the Supreme Court. Section 238 of the Judicial Code deals with those cases which may be taken by direct appeal from the District Court to the Supreme Court. No mention is there made of equity cases arising under the Sherman Anti-Trust Act. The special provision in the statute we have quoted is independent of and in addition to the appeals provided by Section 238. Appellees contend that because Rule 36 of this Court provides that an appeal under Section 238 may be allowed by a Justice of the Supreme Court, every appeal which a Justice of this Court allows must therefore be taken under Section 238. Of course, this does not follow. There is nothing in the record to show that the application was made under Rule 36.

There can be no doubt but that a Justice of this Court has authority to grant an appeal with or without supersedeas in any case where the statutes permit an appeal direct from the District Court to this Court. Section 999, R. S. provides:

> "When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days notice."

It is true that the writ mentioned in this statute

means a writ of error, but Section 1012, R. S., provides:

> "Appeals from the circuit courts and district courts acting as circuit courts * * * shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

By virtue of this statute Section 999, R. S. applies to appeals as well as writs of error. Section 999 and the authority thereby conferred upon a Justice of this Court are considered in the case of

Sage v. Railroad Company, 96 U. S. 712-715,

where it is said:

> "Whoever can sign a citation may allow an appeal; and by Section 999, R. S., it is provided that this may be done by a judge of the Circuit Court or a justice of this court. The power is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held. When, therefore, Mr. Justice Hunt accepted the security in this case, he allowed an appeal, which, by reason of the form of the security, was to operate as a supersedeas."

It will be noted that this case was an equity case and could be reviewed, therefore, only by appeal.

The question of the authority of a Justice of this Court was again presented in

Hudson v. Parker, 156 U. S. 277.

The statutes on the subject are carefully reviewed in this opinion and it was held that any Justice of this Court may in or out of Court allow a writ of error, sign the citation, approve the surety offered or grant a supersedeas. These statutes and decisions make it clear that the authority of a Justice of this Court to allow an appeal does not in any way depend upon Rule 36 or any other rule promulgated by this Court. An appeal may be allowed by a Justice of this Court in any case where under this statute an appeal lies to this Court. All the decisions cited in the brief of appellees upon this point are cases which deal with appeals taken under Section 238 of the Judicial Code. Such a case is

Wilson v. Republic Iron & Steel Co. et al., 257 U. S. 92.

It was held in that case the Circuit Court of Appeals had power to review all features of the case, and a writ of error was prosecuted direct to the Supreme Court of the United States, which writ, of course, could be sued out only under Section 238 of the Judicial Code. The only question presented to this

Court was the jurisdiction of the Federal Court as such. This case furnishes no authority for the contention that because appellants here applied to a Justice of this Court for an appeal they thereby elected to appeal under Section 238 of the Judicial Code. No such election is involved since the appeal was taken under the provisions of the Sherman Anti-Trust Act, which we have referred to, allowing an appeal direct to this Court from every final decree rendered in an equity suit under this act.

Again, the Court will observe that Appellants applied to the District Court and were allowed an appeal by that Court. At page 514 of the Record will be found a petition for appeal addressed to the Circuit Judges of the United States for the Eighth Judicial Circuit sitting as a District Court. Attached to this petition is an assignment of errors. On page 522 et seq. of the Record will be found an order entered by the Circuit Judges holding the District Court allowing this appeal with supersedeas. It is obvious, therefore, that if no application had been made to a Justice of this Court appellants would be properly here with their appeal, which has been duly allowed by the Circuit Judges. It should be explained that after the appeal was allowed by the Circuit Judges application was made to a Justice of this Court for an appeal with supersedeas for the reason that the order of the District Court allowing the supersedeas

was not as compiete as appellants desired. There was no difficulty about the appeal, but the order of the District Court did not permit so much of the decree as applied for the future to be superseded. Under that decree appellants were required to begin almost immediately to pay the charges of the Terminal Association and the application was made to a Justice of this Court in order to secure a more satisfactory supersedeas.

In the second place, Mr. Chief Justice White, in an opinion delivered in this case, U. S. v. Terminal Railroad Association et al., 236 U. S. 194, expressly held that every controversy arising out of the execution of the mandate was open to review either by original proceedings or in any other appropriate form:

> "The duty of the court below was but to execute the mandate of this Court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this Court to examine, either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross-appeal—a result inevitably arising from the fact that both parties, so far as the settlement of the decree of this Court was concerned, were in this court and endowed with the capacity to invoke its action for the proper

shaping and execution of the decree, either by original proceeding or in any other appropriate form (Perkins v. Fourniquet, 14 How. 328; Re Sanford Fork & Tool Co., 160 U. S. 247; In re Potts, 166 U. S. 263)" (Rec. 88).

Since the District Court has undertaken to punish these appellants for the violation of a decree entered pursuant to a mandate, and this controversy arises directly over the mandate and the decree, beyond any shadow of a doubt this Court has the right to hear now, or hereafter, any matter which may arise concerning the mandate or decree.

The point urged by appellees that the only question which the Court can consider upon this appeal is the jurisdiction of the lower court as a federal court is manifestly without merit. As stated by Appellees on page 13 of their brief, the issue to be decided by the lower Court and to be decided by this Court is: Were appellants in contempt of the decree of the District Court, and if so, was the proper punishment meted out?

II.

Alleged Violation of Decree.

Throughout the brief filed by appellees it is assumed that the East Side Lines have violated the decree of the District Court. That this had been done

was the finding of the court below. But no one has ever pointed out anything in the decree which had the slightest bearing upon the question of who should pay the transfer charges for moving freight from one side of the Mississippi River to the other. The decree alleged to be violated is found at pages 103 et seq. of the Record. Not a word is there contained bearing on the question of these charges. It is nowhere either directly or inferentially even suggested that it is the duty of the East Side Lines to pay the charges of the Terminal Association in either direction. In assuming that the decree has been violated by the East Side Lines and by the Terminal Association with respect to these charges, appellees constantly beg the question. That question is as to whether the court below was justified in saying that the decree finally entered in the original case was violated by the East Side Lines because they declined to pay the charges of the Terminal Association on traffic moving through the East St. Louis-St. Louis gateway. At the outset it may be as well to state that it is conceded in the brief of appellees that paragraph 3 of the final decree, that being the paragraph which prohibited rebilling at East St. Louis, is entirely out of the case. As stated by appellees at page 12 of their brief:

> "The East Side Lines, however, agree at page 7 of their Brief, with the West Side Lines, that

there is no question on this appeal based on this practice of rebilling."

If the decree be examined paragraph by paragraph it will be found that the first paragraph is the only one which can, by any possible construction, be considered as having any bearing on the case. It is there recited that the Terminal Association is an unlawful combination as long as it is operated as a railroad transportation company. It is further stated that it may continue to operate as a lawful unification of terminal facilities provided it will abandon all operating methods and charges as and for railroad transportation, and as long as it confines itself to the doing of a terminal business such as supplying and operating facilities for the interchange of traffic, etc. (Rec., 104). The defendants are enjoined from continuing the combination otherwise than as terminal facilities for the railroad companies. We assert that there is nothing in this language which gave the Court below the slightest authority for holding that the East Side Lines had violated the decree because they declined to pay the charges of the Terminal Association for handling through traffic in interchange. The Court below held that the Terminal Association then was not violating the terms of the decree, in that it published tariffs and participated in through rates and divisions. In the original

decree there is no suggestion that the Terminal Association may not continue to do business as a separate corporate entity. The restriction is upon the character of the business which it does. It must not do business as a railroad company in the ordinary meaning except such business as originates and terminates on its own rails. How can it be said that the decree against continuing to do a transportation business is violated because the East Side Lines, in accordance with their tariffs and division sheets, declined to pay charges which the West Side Lines have always paid under their agreements and contracts with the East Side Lines? What has the payment of these charges to do with the question of whether the Terminal Association is doing a transportation business or a terminal business? The decree says that the Terminal Association can lawfully continue only as a unification of terminal facilities and that it must abandon all operating methods in general use by railroad transportation companies. In other words, it must limit itself to a switching and terminal business.

But its charges must be paid; it must continue to receive support by the railroads that employ these facilities. The question of who shall pay the Terminal Association for these services is in no way involved in the question of whether the services performed and the operating methods used are incon-

sistent with the status of the Terminal Association as a switching line. The contention seems to be that because the West Side Lines pay the charges in both directions the Terminal Association is doing a transportation business. The contention seems to be further that if the East Side Lines and West Side Lines divide these charges, then the effect of so doing would be to transform the Terminal Association from a company doing a transportation business into a company doing a strictly terminal business. Such a contention is manifestly unsound.

It is said, however, that there is some obligation on the part of the Terminal Association to act as the impartial agent of all the lines which use its facilities. Assuming that the Terminal Association must maintain this impartial attitude, and conceding for the purpose of the argument that it is a duty enjoined by the decree upon the Terminal Association, in what way has it been shown that the Terminal Association has acted impartially? The Terminal Association does nothing but move freight from one railroad to another. It is unconcerned whether its charges are paid by the East Side Lines or by the West Side Lines. It has nothing to do with that phase of the matter. Whether the charges shall be paid by the lines on the east or the lines on the west is a matter to be settled between those lines.

There is nothing in this record to show that the Terminal Association has taken any part in this controversy. Appellees assert in their brief that the appeal of the West Side Lines to the Terminal Association for fair treatment has been ignored. The record, however, does not bear out this assertion. It is true that letters were addressed to the Terminal Association by the West Side Lines making certain demands, but the Terminal Association properly took the position that these were demands with which it had nothing to do. The Terminal Association disposed of these communications by saying that so far as it could ascertain from the advice of its counsel it was obeying the decree.

It is said that the Terminal Association has not been acting as the impartial agent of all lines because it would not accept traffic from the West Side Lines without prepayment of charges or a promise on the part of the West Side Lines to pay charges. The record shows, however, that the Terminal Association did not take this position until after the East Side Lines had refused to receive traffic delivered by the West Side Lines. Obviously the Terminal Association could not go on receiving freight from the West Side Lines which the East Side Lines had declined to accept. Such action would have resulted in congestion on the line of the Terminal Association without any way settling the controversy.

If it be said, however, that the Terminal Association is dominated by the East Side Lines, due to the preponderance of east side directors on its Board, it is difficult to see how the refusal of the East Side Lines to pay the transfer expense is a violation of any injunction found either in the decree or in previous decisions of the Court relating to impartial treatment. It will certainly not be contended that the Court in contempt proceedings can for all future time settle every dispute that may arise between the railroads serving the St. Louis-East St. Louis district, whatever may be the nature of this dispute, on the theory that the decree requires impartial treatment. The decree cannot be extended so as to make it a vehicle or medium through which all future disputes between railroads are to be adjusted.

III.

The Breaking Point of a Rate Is a Rate Question.

Here is a controversy between the East Side Lines and the West Side Lines about where the rates shall break. The Court below by reason of some theory that impartial treatment should be accorded to all lines by the Terminal Association proceeded to settle this dispute. It was a dispute as to where the rates should break and how the tariffs should be constructed. It was contended by the East Side Lines that the rates were so constructed as to make it

equitable for rates to break at East St. Louis, and they further contended that in the apportionment of revenue to such lines, consideration has always been given to the fact that East St. Louis was the breaking point of the rates and the point of interchange of the traffic, and that the West Side Lines were compensated for absorbing the charges of the Terminal Association through the division of the through rates which were given to the West Side Lines. The West Side Lines, however, contend that in fairness the charges of the Terminal Association should be divided. Without at this time going into the question of who is right about it, it is manifest that this dispute is one for the Interstate Commerce Commission, under provisions of the law to which we have called attention in our original briefs. The Court below, however, seems to take it for granted that the mandate as to impartial treatment required a decision that the East Side Lines should pay one-half of these charges. Any other controversy which may be suggested could just as well have been decided by the Court upon this theory. If a decree of this kind is to be upheld, no controversy can be imagined as between the parties to the original decree which cannot be settled by reference to this decree and that, too, through the medium of contempt proceedings.

IV.

The Terminal Association Has Been Impartial.

It is said that the Terminal Association must be impartial. Let that be granted for the sake of the argument. How has it ever been shown here to have acted not impartially? It is said its failure to act impartial is shown because it required the West Side Lines to pay the transfer charges in both directions. The question then inevitably arises as to whether it was proper for the West Side Lines to pay the charges in both directions. To settle this question the Court must look to the geographical situation, to the history of the rate structure, to the service which is performed by each of the parties and to all those considerations which only the Interstate Commerce Commission can initially consider in fixing divisions. Therefore, when the District Court held that the West Side Lines had not been fairly treated, it invaded the province of the Commission.

V.

The Terminal Association Has Not Been Guilty of Unlawful Practices.

It is said throughout the brief of the appellees that the Terminal Association was required by the

original decree to abandon unlawful administrative and operating practices. But nowhere is it pointed out in the brief as to just what unlawful practices the Terminal Railroad Association has continued. There is a lack of particularity in statement when reference is made to these unlawful administrative practices. What are they? Just what has the Terminal Association done at any time which is prohibited by the decree? It disclaims having willfully or knowingly issued bills of lading or passes and it does not particularly object, except upon ethical grounds, to the decree of the lower Court with respect to these alleged practices. But we ask this Court to search the record and find any single administrative practice of the Terminal Association relating to this question of payment which is prohibited by the original decree either expressly or by implication. The Terminal Association simply handled the freight which was handed to it and collected the charges according to arrangements made with the railroads for whom the service was performed, pursuant to tariffs and concurrences on file with the Commission.

Let us assume that there is a movement of through traffic from Buffalo, New York, to Denver, Colorado, by way of East St. Louis and St. Louis. According to division sheets and tariffs now in effect, some East Side Line takes the traffic to East St. Louis for a

certain proportion of the rate. One of the West Side Lines transports the traffic from East St. Louis to destination for the balance of the rate. The decree from which we appeal in effect provides that the East Side Lines shall take this traffic to St. Louis and there deliver it to the West Side Lines so that the expense of taking the traffic across the river will be borne by the East Side Lines. And the decree holds further that because the East Side Lines have not been doing this for some time they have violated a decree which did not deal with this question at all and which no one could possibly suspect had any relation to this question. Plainly a controversy between the East Side Lines and the West Side Lines on this subject is a question of divisions, a question of the absorption of switching charges; questions which are admittedly within the exclusive domain of the Interstate Commerce Commission.

VI.

The West and East Side Lines Have Agreed Where the Rate Shall Break.

Appellees say in their brief that the Court below did not undertake to fix rates or divisions—that it only asserted its authority to prohibit the East Side Lines from requiring the West Side Lines to pay more than their share of the expense. But the ques-

tion is, what is that share? Upon what considerations is that share to be fixed? It would not be asserted we assume that the East Side Lines and West Side Lines are prohibited by the decree from entering into an agreement if they saw proper that the West Side Lines should bear all the expense in both directions. In reality that is what the present situation amounts to. As pointed out in our original briefs, the history of the controversy shows that the West Side Lines in order to meet the competition of the Chicago & Alton Railroad voluntarily agreed to pay terminal charges in both directions. This arrangement was in effect at the time the original suit was brought and at the time the original decree was entered and was never mentioned by anybody. It was a matter of no concern to the public as to who paid these charges. It was a matter of arrangement among railroads. These arrangements vary in different cities according to circumstances which prevail in such cities. It is safe to say that in Chicago in some cases the charges are paid in both directions by one line and in other cases they are divided according to agreements made among the railroads. These terminal associations are found in many large cities. Can it be said that the Sherman Anti-Trust Law is violated in every case where the carriers do not divide the expense equally? Competition and other reasons cause a variation in the practice, and, in fact, competition at St. Louis is

responsible for the agreement of the West Side Lines to bear the transfer charges in both directions. If conditions have now changed so as to make such an agreement no longer equitable, the Interstate Commerce Commission exists to make such orders as are appropriate. We assert with confidence that the terms of the decree have never been disobeyed; that the Terminal Railroad Association has never acted unfairly or impartially and that the District Court has undertaken to decide a controversy here over which the Interstate Commerce Commission only has jurisdiction.

VII.

Railroads Not Parties to This Suit Will Be Affected by This Decree.

The result of the District Court's order in this case and the confusion which results therefrom can probably best be understood by considering the effect of this decree so far as it relates to nonproprietary lines, using the facilities of the Terminal, but not parties to the suit. The record shows that a number of railroads, like the Mobile & Ohio; Chicago Peoria & St. Louis; Toledo, St. Louis & Western and others enter East St. Louis from the East. They are East Side Lines. They are in competition with other East

Side Lines on traffic from many sections of the country. The Mobile & Ohio is in sharp competition with the Illinois Central for traffic originating south of the Ohio River. By reason of the fact that the Illinois Central is a Proprietary Line, while the Mobile & Ohio is not, the Illinois Central is required by the terms of the decree to pay the transfer charges on westbound traffic moving through St. Louis, while the Mobile & Ohio is not so required, not being a party to the proceeding. If the decree be affirmed we will therefore have a situation in which one railroad is required to bear the transfer charges in one direction and another railroad is not, although circumstances and conditions are precisely the same. Yet both railroads are interested in the same situation, both use the terminal facilities on precisely the same terms and no possible reason can be given why one should be treated differently from the other. If it is unfair for the West Side Lines to pay the charges on traffic delivered to them by the Illinois Central, it is just as unfair for them to pay the charges on the traffic delivered by the Mobile & Ohio. This situation illustrates how impossible it is for a Court administering the Sherman Anti-Trust Act to settle these questions of charges, rates and divisions, as the court below has undertaken to do.

VIII.

Contention as to the Character of the Facilities of the Terminal Association.

Appellees, in their brief, say that the effect of the decree is to make the rails of the Terminal Association extensions of the rails of the Proprietary Lines. Such cannot be the effect of the decision, since the final decree recognizes the right of the Terminal Association to continue as a separate corporate entity. But even if such be the effect of the decision, appellees do not in any way improve their position, for it must be remembered that the West Side Lines are also proprietors of the Terminal Association. All four of the appellees are equal owners in the Terminal Association. If the effect of the decree is to extend the rails of the East Side Lines westward, as far as the terminal rails extend, by the same token, the rails of the West Side Lines are extended eastward as far as the terminal rails extend in that direction. Upon this theory the East Side Lines are in St. Louis, but upon the same theory the West Side Lines are in East St. Louis.

If it be said that it is the duty of the East Side Lines to carry the traffic as far as their rails extend, it may be said with equal force and logic that it is the duty of the West Side Lines to carry the traffic

as far as their lines extend and receive the traffic at the point where their rails extended join the rails of the East Side Lines. Traffic moving from east to west through St. Louis, if the theory just mentioned be sound, is on the rails of the West Side Lines when it reaches East St. Louis, where the lines of the Eastern carriers end. We have a case, therefore, where there is a point of interchange both at East St. Louis and at St. Louis, and the question involved is: Where is the reasonable point of interchange? Plainly, this is a question for the Commission. If we assume that the Terminal Association is dissolved and all its property and facilities become the property of the Proprietary Lines as tenants in common, the question which the lower Court assumed to decide would not be in any way simplified. East St. Louis would still be a point on the rails of the West Side Lines because their ownership extends to East St. Louis. The East Side Lines and the West Side Lines would still have to settle the question as to whether the traffic should be interchanged at the one place on the lines of both or at the other place on the lines of both. Such a controversy could be settled only by considering elements with which the Interstate Commerce Commission, as an expert body, is alone qualified to deal.

IX.

The Terminal Association Must Act as It Does or Violate the Law.

The West Side Lines and the East Side Lines file tariffs with the Interstate Commerce Commission, and the Terminal Association concurs in these tariffs. The order of the District Court now in dispute requires the East Side Lines to pay back to the West Side Lines the terminal charges which have accrued under these tariffs and concurrences since March 2, 1914, and in the future to pay the terminal charges on through westbound business to the West Side Lines. The Terminal Association has only accepted payments as provided in these tariffs on file with the Interstate Commerce Commission. Without violating the law no different payments could have been made.

U. S. v. Union Stock Yards Company et al., 226 U. S. 286;
St. Louis Chamber of Commerce v. B. & O. R. R. Co. et al., 57 I. C. C. 639.

The only way the Terminal Association and the East Side Lines can comply with the order of the District Court requiring them to make payments will be to change their tariffs and concurrences on file with the Interstate Commerce Commission. To comply with this order will destroy the rate structure

now existing at this gateway, and all the Non-Proprietary East Side Lines will be coerced into filing new tariffs with the Interstate Commerce Commission. While the order of the District Court does not in terms direct the filing of these tariffs, yet this order cannot be obeyed without such tariffs being filed. In this situation the conclusion cannot be escaped but that a question of tariffs is involved in this controversy, and the jurisdiction of the Interstate Commerce Commission has been invaded.

X.

The Activities of Terminal Association Are Subject to the Exclusive Control of the Interstate Commerce Commission Under the Transportation Act of 1920.

The Appellees argue that the Transportation Act of 1920 does not apply to the regulation and control of the Terminal Association, since they say that they and the East Side Lines have agreed upon the use of the terminal properties, and the appellees seem to contend that the Interstate Commerce Commission would only have jurisdiction over this terminal situation in the event of a disagreement. (Brief for appellees, p. 22.)

In the light of the controversy that is now raging both over the use of the terminal properties as well

as the payment for such use, we are utterly at a loss to understand how the appellees conceive that no such disagreement exists at present between themselves and the East Side Lines.

The Terminal Association insisted in its brief, and again reiterates, that the Transportation Act of 1920 vested exclusive jurisdiction in the Interstate Commerce Commission to control the relations between these Terminal Companies and all the user lines, whether Proprietary or Nonproprietary, and that if the West Side Lines are not satisfied with the present method and practice under which the terminal charges are imposed, then their remedy lies before the Interstate Commerce Commission and cannot be invoked as growing out of the violation of any Court decree.

We further contended, and still contend, that this Court has no jurisdiction to disturb rate conditions which have existed here since 1877, and the destruction of which would not only profoundly disturb the revenues of other eastern carriers at this gateway not parties to these proceedings, but would affect the rate structures now in effect at other crossings of the Mississippi River.

It seems to us too clear for much argument that this action is but an effort on the part of the West Side Lines to obtain by indirection and through an order of Court a change in a matter which is originally and

exclusively within the power and authority of the Interstate Commerce Commission.

It is difficult to understand why the West Side Lines, if they feel themselves unfairly treated, have not taken this controversy to the Interstate Commerce Commission, where their right to relief is perfectly clear, provided their cause be just.

There are other contentions in the brief of the appellees with which we do not agree, but these have been anticipated and we think answered in our original brief.

Respectfully submitted,

R. V. FLETCHER,
L. J. HACKNEY,
ALEX P. HUMPHREY,
MORISON R. WAITE,
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D. P. WILLIAMS,
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No. 425.

Appeal from the District Court of the United States for the Eastern District of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF JOHN F. LEE AND GEORGE M. BLOCK, AMICI CURIAE.

(NO. 29,735.)

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

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(NO. 29,735.)

STATEMENT.

The Evens & Howard Fire Brick Company, hereinafter called Brick Company, has a large plant for the

manufacture of brick and other kindred products, located on the line of the Terminal Railroad Association, in the City of St. Louis. Five (5) miles distant on the line of said Terminal Association the Brick Company owns and operates clay banks from which it obtains its entire supply of clay with which to operate its plant. The Terminal Association moves all of the clay from said mine to said manufacturing plant, and this business amounts to more than two thousand (2,000) loaded cars a year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any railroad constituting one of the proprietary lines of said association or with any other railroad, and is entirely intrastate business, and without the movement of this freight by the Terminal Association the Brick Company must necessarily close down its plant and be subjected to irreparable loss. (See Rec., p. 74.)

The Missouri Portland Cement Company (formerly the Union Sand and Material Company, its name having been changed but its legal identity being the same, and hereinafter called the Cement Company) has its elevator plant at the foot of Tyler street for the elevating of sand from the Mississippi River, in the City of St. Louis, located on line of the Terminal Association. At this plant all of the sand which it produces for the use of the City of St. Louis and surrounding territory is elevated and loaded into cars,

and it has erected and constructed an elevator plant at this point at a large cost to it, and it owns and uses a large number of cars in moving and delivering its sand from this plant. It has various yards located on the Terminal Association for supplying sand in the City of St. Louis, and it also supplies a large amount of sand to various industrial plants and factories located on the tracks of the Terminal Association. For the Cement Company the Terminal Association now moves from Tyler street to the various yards of the Cement Company and to said industrial plants many thousand loaded cars a year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any other railroad constituting one of the proprietary lines in said association or with any other railroad, and is entirely intrastate business, and without this movement of the product of the Cement Company by the Terminal Association from the Tyler street plant to the other yards and industrial concerns above set out it would be impossible for the Cement Company to supply its sand to various points in the City of St. Louis, as to move its said product in any other way than by loaded cars moved over rails would make the cost prohibitive. (See Rec., p. 78.)

There were joined with the Brick Company and Cement Company in the original interventions fifty-three other parties similarly situated on the Terminal

Railroad Association, the movement of whose freight exclusively over the Terminal aggregated many thousand loaded cars a year.

The case of the United States of America v. Terminal Railroad Association et al. was a suit originally brought in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, under the Anti-Trust Acts of the United States, the purpose being to have the Terminal Railroad Association declared an illegal combination in restraint of trade, and to have it enjoined from further continuing to operate in contravention of the Anti-Trust Acts of the United States. In March, 1914, a decree was entered in the District Court declaring the Terminal Association to be a trust and an illegal combination, but, providing, because of peculiar conditions existing, that it might continue to operate as a unification of terminal facilities, but subject to certain conditions. Section 1, on page 2, of said decree reads as follows:

> "The defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents, **otherwise than as terminal facilities for the railroad companies using the same.**"

Said section 2 of said decree further provided that the Terminal Association may continue as a lawful unification of terminal facilities

> "**upon abandoning all operating methods and charges as and for railroad transportation** and confining itself to the transaction of a terminal business, **such as supplying and operating facilities for the interchange of traffic between railroads.**"

This case was appealed to the Supreme Court of the United States, both by the plaintiff and the defendants. After the appeal had been taken by the Government in that case the Brick Company and the Cement Company first learned of the form of the decree, as hereinabove set forth, which prohibited the handling of their products over the Terminal Association. They thereupon sought to intervene in the District Court of the United States for the Eastern Division of the Eastern District of Missouri for the purpose of having the decree modified, in so far as to have it provide that the Terminal Association should be permitted to handle the business of the said Brick Company and Cement Company, and others situated like unto them, when initiating on, transported on and delivered to points located on the line of railway of the Terminal Railroad Association. The District Court permitted the petitions for intervention to be

filed and these will be found on pages 74 and 78 of the record, but refused to grant any relief because the Court had lost jurisdiction to grant relief by reason of the prior appeal of the Government. Thereupon, the Brick Company and the Cement Company applied to this Court at the October Term, 1914, for leave to intervene as original intervenors in this court, refiling the same intervening petitions which had been brought up on the record. This Court granted the application and permitted the Brick Company and Cement Company to intervene in said cause in this court and intervenors participated in the argument at the October Term, 1914. This Court rendered its opinion in said cause on the 23rd day of February, 1915. In its opinion, it said:

> * * * "It may not be disputed that the clause of the first paragraph of the decree, which is in the margin, pointing out the character of the business which the Terminal Company, as reorganized, was authorized to pursue, is susceptible of the construction that the right was excluded to do anything but a terminal business in the narrow sense, and therefore did not permit the company to carry on as ancillary to its terminal business a transportation business, even although originating and terminating on its lines. This being true, we are of opinion, despite the contentions of the United States to the contrary, that the provision in the decree on that subject did not give proper effect to the mandate of this

Court, and should be qualified so as to recognize the right to do, in connection with the terminal business proper, such transportation business as originates and terminates on the lines of the terminal company, for the following reasons: Because not to so decide would lead inevitably to the conclusion that the decision of this Court contemplated safeguarding one public interest by destroying another, and in effect proposed making the movement of transportation freer in some channels by absolutely obstructing all possibility of its flow in others; and moreover, because it assumes that the decision proposed to cure the defects in the organization of the combination which caused it to be in conflict with the Anti-Trust Act by commanding the abstention from the prosecution of business which otherwise under the law there would have been a duty to carry on, thus virtually seeking to remove one cause of illegality in a combination by substituting another."

* * * "As these considerations, in our opinion, demonstrate that the decree should be modified by permitting the carrying on by the company, as incidental to its terminal business, of a transportation business originating exclusively on its own line, moving thereon and terminating thereon, a direction to modify the decree in that respect must necessarily follow."

* * * "It follows from what we have said that the decree below, giving effect to the mandate of this Court, will be modified so as to recognize the right of the terminal company, as an accessory

to its strictly terminal business, to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same, and in other respects the decree will be affirmed." (See United States v. Terminal Railroad Association, 59 Law Edition, l. c. 539, 540 and 541, 236 U. S., l. c. 204, 205, 206, 210.)

The decree entered by the District Court of the United States for the Eastern Division of Eastern District of Missouri, in pursuance to the mandate and decree of this Court, under the decision reported in 59th Law Edition at page 535 (236 U. S. 194), so far as it relates to the questions involved in the intervening petitions of the Brick Company and Cement Company, reads as follows:

"An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing and conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or to its constituents otherwise than as terminal facilities for the railroad companies using the same and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered; provided, always, that the Terminal Railroad Association may, as an accessory to its strictly terminal business, carry

on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same." (See Rec., pp. 119, 120 and 121.)

And in the same cause the District Court of the United States for the Eastern Division of the Eastern District of Missouri, on motion of the Brick Company and Cement Company, intervenors, added a clause to the final decree pursuant to the decision of this Court, reported in the 236 U. S. 194 (59th Law Edition, page 535), containing the same provision as has just been cited. (See Rec., pp. 122 and 123.)

BRIEF.

The injunction and judgment rendered against the Terminal Railroad Association in the proceedings brought against it by the Government under the anti-trust acts of the United States was not intended and should not apply so as to prohibit the Terminal Railroad Association from doing a transportation business as an accessory to its strictly terminal business or to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same, but such decree should be so drawn as to recognize such right of transportation by the Terminal Railroad Association.

United States v. Terminal Association of St. Louis;

Terminal Railroad Association et al. v. United States;

Re Evens & Howard Fire Brick Company et al. (59 Law Edition, l. c., pp. 539, 540 and 541), 236 U. S., l. c. 204, 205, 206 and 210.

ARGUMENT.

The present proceeding now pending in this court on appeal from the District Court of the United States for the Eastern Division of Missouri is a proceeding initiated by motion in the original case by certain railroads, members of the Terminal Railroad Association, and whose lines terminate on the western bank of the Mississippi River, and is against certain other railroads, members of the Terminal Railroad Association, whose lines terminate on the eastern bank of the Mississippi River. The contest involves the construction and interpretation of the final decree of the District Court of the United States entered in accordance with the mandate and decree of this Court rendered in the case reported in 236 U. S. 194 (59th U. S., page 535), seeking, by this proceeding, to obtain a construction of said decree, so far as it applies to a division of through rates.

We readily concede that on the face of the record the interests of the Brick Company and the Cement Company and others similarly situated do not seem to be directly involved, but neither did they seem to be involved under the original proceeding, nor could anyone conceive that the interests of these parties were or could be in any way affected by the mandate and decree of this Court in the case reported

in 224 U. S. 383 (56 L. ed. 810). The Brick Company and the Cement Company were not parties to that proceeding, nor did they have any warning of the danger to their interests, which might arise in the original proceeding, nevertheless, under the wording of the decree of March, 1914, by the District Court in the original proceeding, the interests of these parties were vitally affected, in fact, if enforced, that decree, as worded, would annihilate the business of these parties. This was due entirely to inadvertence and oversight. There was no information given to this Court, or to the District Court, of the interests and situation of the Brick Company and of the Cement Company and, so, the decree came down, general in terms and destructive of their interests and business. Warned by this result, and realizing that in this immediate proceeding the record is complicated and large; that the briefs will be voluminous; that there is nothing in this particular record to call the Court's attention to the situation of the Brick Company and the Cement Company; feeling that their interests might, by reason of these facts, be overlooked and a decree might be entered now, as heretofore, vitally affecting them, it has seemed to be a wise and proper thing to file this memorandum, clearly advising this Court of what the rights and interests of the Brick Company and the Cement Company are, especially as heretofore fixed by decree of this Court

in 236 U. S. 194 (59 L. Ed. 535), so that they may not suffer a wrong such as was inflicted upon them in the prior proceeding.

Wherefore, we humbly pray that when this case comes to be heard by this Court, it will bear in mind the interests of the Brick Company and the Cement Company and others similarly situated, and that this Court will see that any decree rendered now in this case shall protect the interests of the Brick Company and the Cement Company and any decree rendered shall not preclude the right of the Terminal Railroad Association, as an accessory to its strictly terminal business, to carry on transportation as to business originating exclusively on its lines, exclusively moving thereon and exclusively intended for delivery on the same, but that the right and duty of the Terminal Railroad Association to do and to perform such transportation shall be clearly provided for.

Respectfully submitted,

John F. Lee,

Geo. M. Block,

Amici Curiae.